March 21. 79. Atty's M. Swayne

9 Otto 261

Oct 1. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 193.

JOHN A. CAMPBELL, DONALD McLANE, ADD WILLIAMS, AND THOMAS WILLIAMS, PLAINTIFFS IN ERROR,

vs.

DAVID P. RANKIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 9, 1876.

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aforesaid on the day and at the place aforesaid, and yet remains among the records of said court in full force and unreversed.

Wherefore plaintiffs pray judgment as in their said complaint.

SHOBER & LOWRY,
Attorneys for Plaintiffs.

MONTANA TERRITORY,
Meagher County, ss:

Add. Williams, being first duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing replication and knows the contents thereof, and that the facts therein stated are true except as to such matters as are therein stated on his information and belief, and that as to such matters he believes it to be true.

ADD. WILLIAMS.

10 subscribed and sworn to before me this 16th day of May, A. D. 1874.

J. E. HALL,
District Clerk.

And afterwards, to wit, on the 19th day of May, A. D. 1874, that being one of the regular days of said court, the said cause came on regularly for trial, and a jury having been regularly empanneled in said cause, the following proceedings were had, which were made matters of record, and are in words and figures as follows, to wit:

In the district court of the 3d judicial district.

TERRITORY OF MONTANA,
Meagher County:

JOHN A. CAMPBELL ET AL.
vs.
DAVID P. RANKIN.

Be it remembered that on this 19th day of May, A. D. 1874, at Diamond City, Montana Territory, upon the trial of the above-entitled cause to a jury, the plaintiffs, to sustain the issues on their part, offered in evidence the record and judgment (after identifying and proving the same by the clerk of said court) in the case of David P. Rankin vs. John A. Campbell et al., tried at the May term, A. D. 1870, of this court; which judgment roll is in words and figures as follows, to wit:

In the district court, 3d judicial district.

11 MONTANA TERRITORY,
County of Meagher:

DAVID P. RANKIN
vs.
JOHN A. CAMPBELL, WALTER COLLINS, Donald McLain, John Doe & Richard Roe & Charles Doe.

Now comes the above-named plaintiff, by his attorneys, Chumasero & Chadwick, and complains of the above-named John A. Campbell, Walter Collins, Donald McLain, John Doe, Richard Roe, and Charles

Doe, the true names of the last three defendants being unknown to this plaintiff, and, for cause of action, allege:

That on the 1st day of November, A. D. 1869, and for a long time prior thereto, the said plaintiff was and now is the owner of and lawfully entitled to the possession of the following-described piece or parcel of mining ground, to wit, being the gulch portion of mining claim number eight, in German mining district, Confederate Gulch, Meagher County, and Territory of Montana; the said gulch portion of said claim belonging to this plaintiff, as above stated, being bounded on the upper line or northeast side by mining claim number nine, in said district, & on the lower line or southwest by mining claim number seven,
12 in said district, and on the side next to the town of Diamond City, in said county, by the front of the lower line of houses on Main street, and on the southeast side by the rim rock of the gulch.

And the said plaintiff further alleges that on the day of November, A. D. 1869, the said defendants wrongfully and unlawfully entered upon the said piece of mining ground and unlawfully took possession thereof, and now unlawfully withholds the same from this plaintiff, to his damage in the sum of two hundred and fifty dollars.

And the said plaintiff further alleges that the said piece of mining ground contains large quantities of gold, and is only valuable for the same; that the said defendants are now engaged in sinking a shaft upon the said mining ground for the purpose of extracting the gold therefrom; and that when the said shaft reaches the bed-rock of said mining claim the said defendants will commence taking out gold, and thereby greatly injuring and damaging this plaintiff and rendering the said mining ground valueless.

That the said defendants are pecuniarily irresponsible and insolvent, and that this plaintiff has no adequate or speedy remedy at law,
13 and will suffer great and irreparable damage unless the said defendants be restrained by this hon. court.

Wherefore the said plaintiff prays judgment for the possession of the said piece or parcel of mining ground, and for two hundred and fifty dollars damage; and that this hon. court may make an order enjoining and restraining the said defendants, and each and every of them, their agents, servants, and employees, from mining upon the said mining ground, and that upon a final hearing it may be made perpetual, and for such other and further relief as may be just and equitable.

CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

David P. Rankin, being first duly sworn, deposes and says that he is the plaintiff named in the foregoing complaint; that he has heard the same read, and knows the contents thereof; that he has reason to believe, and does believe, that the matters as therein stated are true.

DAVID P. RANKIN.

Subscribed & sworn to before me this 10th day of January, A. D. 1870.

W. F. CHADWICK,
Notary Public.

Filed Jan'y 25th, A. D. 1870.

T. J. DAWES,
Clerk.

14 *Answer.*

In the district court of the 3d judicial district.

TERRITORY OF MONTANA,
County of Meagher:

DAVID P. RANKIN
vs.
JOHN A. CAMPBELL, WALTER COLLINS, DONald McLain, et al.

Now come John A. Campbell, Walter Collins, and Donald McLane, by their attorneys, Smith and Cullen, and for answer to plaintiff's complaint herein respectfully show to this hon. court:

1st. That they admit that upon the day mentioned in said complaint the plaintiff was, and now is, entitled to the possession of the gulch portion of claim numbered eight (8), above discovery in Greenhorn district, Confederate Gulch, Montana Territory.

2d. They admit that said claim is bounded by claim numbered nine and claim numbered seven, above and below said claim, but deny that the claim is bounded on the side next Diamond City by the front of the lower line of houses on Main street, but on the contrary aver that the said claim is bounded on said side by the lower rim-rock of the gulch.

3d. And defendants deny that they or either of them, on the 1st day of November, 1869, or at any other time, wrongfully or unlawfully
15 entered upon any part or portion of said claim numbered eight, or have wrongfully with'eld possession thereof from the plaintiff, but admit that they have worked within the limits specified in said complaint as the boundary on the town side of said claim.

4. And defendants admit that within the boundary mentioned in said complaint they have been sinking a shaft as alleged, but deny that the same is upon said claim numbered eight or any part thereof.

5. And defendants deny that they are pecuniarily irresponsible and insolvent, but on the contrary aver that they are pecuniarly responsible and able to respond to the plaintiff in damages; deny that the plaintiff will suffer great and irreperable damage, or any damage whatever, unless defendants are restrained.

6. And defendants, further answering, say that on the 18th day of December, 1869, they purchased from J. R. Weston and J. A. Harding, who were the original owners of the same, claim numbered two (2) below discovery in Greenhorn Gulch, in German mining district, Meagher County, Montana Territory, and that the same extends from the lower boundary of claim numbered one (1), on said Greenhorn Gulch,
16 down the same two hundred feet, and to the line of the lower rim-rock of said Confederate Gulch; and that all the work done by them, as alleged in said complaint, is upon said claim numbered two (2) below discovery, in said Greenhorn Gulch, and not upon claim numbered eight (8) in Confederate Gulch, or any part or portion thereof.

They further aver that they are the owners of and lawfully in possession of said claim numbered two (2) below discovery in said Greenhorn Gulch, and that the bounds given as claimed by plaintiff on the town side of claim numbered eight, Confederate Gulch, covers a large portion of the ground owned by these defendants, and which they say is not a part of the gulch portion of claim numbered eight, but is part

and parcel of claim numbered two below discovery in said Greenhorn Gulch.

Wherefore defendants pray judgment that they may be dismissed without day, and have judgment for their costs.

SMITH & CULLEN,
Atty's for Defendants.

COUNTY OF LEWIS & CLARKE, *ss:*

John A. Campbell, being first duly sworn, says that he is one of the defendants named in the foregoing answer; that he has heard the said answer read, and knows the contents thereof, and that he has reason to believe, and does believe, the same to be true.

17 JOHN A. CAMPBELL.

Subscribed and sworn to before me this 28th day of January, A. D. 1870.

W. E. CULLEN,
Notary Public.

Filed January 29th, A. D. 1870.

T. J. DAWES,
Clerk.

Verdict.

In 3d judicial district court.

TERRITORY OF MONTANA,
Meagher County:

DAVID P. RANKIN
vs.
JOHN A. CAMPBELL, WALTER COLLINS, & DONald McLane.

We, the jury in the above case, find for the defendants.

H. R. CLINTON,
Foreman.

In 3d judicial district court.

MONTANA TERRITORY,
Meagher County:

D. P. RANKIN
against
JOHN A. CAMPBELL ET AL.

After the trial of the above case, and verdict rendered therein by the jury for defendants, and upon motion made by att'ys for defendants for dissolution of injunction granted herein, it is hereby ordered and adjudged that said injunction is hereby dissolved.

18 Given under my hand this 27th day of May, A. D. 1870.

G. G. SYMES,
Judge of 3d Judicial District Court, Montana Territory.

In 3d judicial district court.

MONTANA TERRITORY,
Meagher County:

DAVID P. RANKIN
vs.
JOHN A. CAMPBELL ET AL. } Judgment.

This action came on regularly for trial. The said parties appeared by

their attorneys. A jury of twelve persons were regularly empanneled and sworn to try said action. Witnesses on the part of plaintiff and defendants were sworn and examined. After hearing the evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say:

We, the jury in the above case, find for the defendants.
(Signed) H. R. CLINTON,
Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said defendants have and recover from the said plaintiffs [the mining ground described in the complaint in this action], and their costs and disbursements incurred in this
19 action amounting to the sum of four hundred & twenty-six $\frac{40}{100}$ dollars.

Judgment rendered May 27, A. D. 1870, and duly recorded May 28th, A. D. 1870.

T. J. DAWES,
Clerk.

The foregoing words inclosed in brackets, seem to have been written above the line in the original record, and claimed by defendant to have been interlined.

J. E. HALL being called as a witness and sworn, testified as follows "In my opinion the interlineation in the record was probably made by T. J. Dawes, my predecessor in office as clerk of this court. I think it in his hand writing." And plaintiff offered to prove by competent testimony that the parties in said action were the same in interest, as in this present action, and that the issues only or mainly tried in said cause was the ownership, possession, and right of possession to the identical piece of mining ground whereon it is alleged the trespass complained of in this action was committed.

To the introduction of which judgment roll in evidence, and the said testimony, the defendant by his counsel objected, which objection was sustained by the court; to which ruling of the court the plaintiff then and there excepted, and pray that this their bill of exceptions may be signed and sealed by the court which is accordingly done.
20 May 20th, 1874.
[L. S.] D. S. WADE, *Judge.*

And afterwards, during the trial of said cause, another bill of exceptions was taken and signed and made a part of the record in said cause, which is in words and figures as follows, to wit:

In the district court 3d judicial district.

MONTANA TERRITORY,
Meagher County:

JOHN A. CAMPBELL, DONALD MCLANE, ADD. Williams, & Thomas Williams
vs.
DAVID P. RANKIN.

Be it remembered that upon the trial of the above-entitled cause to a

jury at Diamond City, in the district court of the 3d judicial district, within & for the county of Meagher, Montana Territory, at the May term of said court, A. D. 1874, the plaintiffs to sustain the issues on their part, introduced JOHN A. CAMPBELL as a witness in their behalf, who being first duly sworn, testified as follows, to wit:

Question. Are you one of the plaintiffs in this case?

Answer. I am.

Question. Where were you on the 30th day of October, 1871?

Answer. I was on our claim No. 2, in Greenhorn Gulch, below discovery.

21 (To which answer the defendants objected, and moved the court to strike the same out; which objection was sustained by the court, and to which ruling of the court, plaintiffs then and there duly excepted.)

Plaintiffs then asked said witness the following questions, to wit:

"Do you know where claim No. 2 in Greenhorn Gulch is situated?

(To which question defendant then & there objected; which objection was sustained by the court, and plaintiff then and there excepted to such ruling of the court.)

Plaintiff then asked the witness the following question, to wit:

"State how long you have been in possession of claim numbered two (2) in Greenhorn Gulch."

(To which question defendant then and there objected; which objection was sustained by the court, and plaintiffs excepted thereto.)

Plaintiffs then asked the witness the following question:

"State whether you have ever had any conversation with defendant in relation to claim No. 2 below discovery in Greenhorn Gulch; and, if so, state what that conversation was."

(To which question defendant then and there objected, which objection was sustained by the court & plaintiffs excepted thereto.)

Plaintiff here offered to prove by oral testimony that defendant

22 Rankin had frequently admitted that there was such a mining claim as claim No. 2 below discovery in Greenhorn Gulch; that the intersection of the rim rock of the two gulches was the dividing line between said claim and claim No. 8, in Confederate Gulch, and that plaintiffs were the owners of said claim. To the introduction of which said testimony defendant objected, and the court sustained such objection and requested the following affidavit to be inserted as his reasons therefor, which affidavit is in words and figures as follows, to wit:

In 3d judicial district court.

MONTANA TERRITORY,
Meagher County:

JOHN A. CAMPBELL, ET AL
vs.
DAVID P. RANKIN.

Add. Williams being duly sworn says, that he is one of the plaintiffs in the above-entitled action; that the plaintiff cannot safely proceed to trial at this term of this court, on account of the absence of one William Dawes, who is a material witness for plaintiffs in this action; that the said Dawes has not been within the county of Meagher since the commencement of this action, or where a subpœna could be served

23 upon him; that at or about the time of the commencement of this action, the said Dawes was in or near Bozeman, in the county of Gallatin, Montana Territory, but within a very few days after the commencement of said action and before his deposition could be procured, the said witness left said Bozeman and went to a trading post, known as Story's trading post, and situate in the county of Big Horn or Dawson Counties, where said witness now is, as this affiant has been informed and verily believes; that affiants and plaintiffs have written letters to said witness, and have diligently sought to procure his attendance at this term of this court, but have been unable to procure the same; that the testimony of the said witness is material to enable plaintiffs to establish their case; that they expect to be able to show and prove by said witness, that at or near Diamond City, in the county of Meagher, Montana Territory, some three or four years ago, and long before the cause of action mentioned in plaintiffs' complaint arose, he the said witness destroyed the original written record and laws of Greenhorn Gulch, in Meagher County aforesaid, which said records and laws established and controlled the size and manner of locating & hold-
24 ing claims in said gulch, and that said records showed the size, lines, boundaries, and location of claim numbered two below discovery in said gulch upon which said defendant committed the trespass complained of in this action, and said records further showed that the predecessors in interest of these plaintiffs took up, possessed, held, owned, and occupied said claim in accordance with the local rules and regulations of miners then in force in said gulch; that said facts which plaintiffs can prove by said witness, cannot, to the knowledge of this affiant, be proven by any other person.

And affiant further says, that this application is not made for delay merely, but that substantial justice may be done in the premises, & affiant verily believes that if this cause be continued for this term of this court, plaintiffs will be able to have the said witness present at the next term thereof or procure his deposition before that time.

ADD. WILLIAMS.

Subscribed & sworn to before me this 16th day of May, A. D. 1874.

J. E. HALL, *Clerk.*

MEAGHER COUNTY, *ss:*

W. E. Cullen being first duly sworn says, that he is one of the attorneys for the plaintiffs in the above-entitled action; that shortly
25 after the commencement of said action and not later than the 20th day of March, this affiant wrote to the witness above named directing his letter to Bozeman, Montana Territory, with the view of procuring his deposition to be taken to be used upon the trial of this cause at this term of court; that shortly after the writing of said letter affiant was informed that said Dawes had left said Bozeman and gone to a trading post situate in the Judith Basin, Montana Territory, and known as Story's trading post, where the said witness has since been eagaged in trading, and at present resides, as this affiant is informed and believes, and which post is situate in no organized county of this territory; that this affiant has since written and sought to procure his attendance at this term of court (it being impossible to obtain his deposition), but that affiant has not been able so to do.

W. E. CULLEN.

Subscribed and sworn to before me this 16th day of May, A. D. 1874.

J. E. HALL, *Clerk.*

To which ruling of the court plaintiff excepted.

Plaintiff then proposed to show by the oral testimony of the witness,
J. A. Campbell, that plaintiffs were the owners of claim No. 2,
26 below discovery in Greenhorn Gulch, and that defendant trespassed upon said claim; to which testimony defendant objected and the court sustained such objection, to which ruling of the court in excluding such testimony, the plaintiffs excepted. The plaintiffs then asked the witness the following question, to wit:

"Do you know where Green-horn Gulch, in Meagher County, Montana Territory, is?"

(Defendant objected, and the court sustained such objection, and plaintiffs excepted.)

Plaintiff then offered to prove orally that said gulch was a mining gulch, and had a claim known as claim No. 2 below discovery in it, and also that plaintiffs and their predecessor in interest had been in possession thereof since A. D. 1866. To the introduction of which testimony defendant objected; his objection was sustained by the court, and plaintiff excepted duly thereto.

The plaintiff then offered in evidence a deed from J. A. Harding and J. R. Weston to some of plaintiffs, and the predecessors in interest of others of said plaintiffs, duly acknowledged and executed, which deed is in the words and figures following, to wit:

Know all men by these presents that we, J. A. Harding and
27 J. R. Weston, of Meagher County, Montana Territory, for and in consideration of one thousand two hundred dollars in hand paid, the receipt of which is hereby acknowledged, have this day sold, and by these presents do sell, assign, convey, and deliver unto Donald McLane, Walter Collins, and John A. Campbell our mining claim No. 2 below discovery in Greenhorn Gulch, German district, Meagher County, Territory of Montana, together with all our right, title, and interest in and to the drain ditch constructed for the purpose of draining said Greenhorn Gulch, together with all the appurtenances thereto belonging, with full power to convert the same to their own use and benefit, their heirs and assigns.

Witness our hands and seals this 18th day of December, A. D. 1869.

J. A. HARDING. [SEAL.]
J. R. WESTON. [SEAL.]

TERRITORY OF MONTANA,
Meagher County, ss:

On this 26th day of January, A. D. 1870, personally appeared before me T. J. Dawes, a notary public in and for the county aforesaid, J. R. Weston and J. A. Harding, personally known to me to be the individuals persons described in the foregoing deed as parties thereto,
28 and who, each for himself, acknowledged to me that he executed the same freely & voluntarily and for the uses and purposes therein mentioned and expressed.

In witness whereof I have hereto set my hand and official seal of office on this the day and year last above written.

[SEAL.] T. J. DAWES,
Notary Public.

[One dollar and fifty cent revenue stamp duly cancelled.]

Filed for record January 29th, A. D. 1870, at 5 o'clock p. m., and duly recorded in book E, pages 193 & 4 of Meagher County records.

T. J. DAWES,
County Clerk.

And plaintiffs offered to prove that they had been in the possession

of the ground therein mentioned, since the execution of said deed under said deed, and defendant objected to the introduction of such deed and such evidence, which objection was sustained by the court, and the plaintiff duly excepted to such ruling of the court. Plaintiffs then asked witness Campbell the following question, to wit: "Has there been any district organization in the gulch in which the ground described in your deed is situate since you have been in possession of the same under your deed?"

To which question defendant objected, which objection was sustained by the court, and to which ruling of the court in not permitting
29 said question to be asked plaintiffs then and there excepted.

Plaintiffs then asked witness the following question, to wit:

"State how long you have been acquainted with Greenhorn Gulch, if you have ever been acquainted with it?"

To which question defendant objected, which objection was sustained by the court; to which ruling of the court plaintiffs then and there duly excepted.

Plaintiffs then asked witness the following question, to wit:

"State if you and the other plaintiffs in this case have ever been in possession of a piece of mining ground in Greenhorn Gulch having distance and defined boundaries, and if so, state how long you have been so in the possession thereof, and how such claim was commonly known and designated."

To which question the defendant objected, and the court sustained said objection; to which ruling of the court in not permitting such question to be asked plaintiff then and there excepted.

Plaintiffs here proposed to introduce the written laws and rules of German district, in which the mining claim alleged to be trespassed upon is situate, and to establish by such laws and rules that the dividing line between claims in Confederate Gulch, in said district,
30 and tributaries thereof, is confined to the intersection of the rim-rocks of the gulches at the point of intersection, and to prove orally that the gulch in which the claim alleged to be trespassed upon is situate in a tributary or side gulch of Confederate.

To the introduction of which said testimony the defendant objected, and was sustained by the court; to which ruling of the court the plaintiffs then and there excepted.

J. E. Hall was then called as a witness and sworn on the part of the plaintiffs, and testified that he was clerk of the district court within and for the county of Meagher, Montana Territory, and produced from the files of said court the judgment-roll mentioned in the former bill of exceptions signed herein, and testified that the same were a part of the records of his office; and being required so to do, said witness produced the judgment-roll and record in the case of John A. Campbell et al., vs. W. T. Ford et al., and testified that the same was a part of the records of his office, said judgment-roll being in the words and figures to wit:

In 3d judicial district.

TERRITORY OF MONTANA,
In and for the County of Meagher:

JOHN A. CAMPBELL, WALTER COLLINS, AND Donald McLane
31 *vs.*
WILLIAM T. FORD & ALFRED METCALF.

The plaintiffs in this case, by Smith & Cullen, and Shober & Lowry,

their attorneys, complaining against William T. Ford & Alfred Metcalf, above-named defendants, state: 1st. That in an action brought by D. P. Rankin in the above named court against these plaintiffs, on the 25th day of January, A. D. 1870, an injunction issued out of this court was duly served on these plaintiffs, by which these plaintiffs were enjoined and restrained from digging, laboring, mining, and extracting gold from claim No. 2 below discovery in Greenhorn Gulch, Meagher County, Montana Territory, claimed by D. P. Rankin to be on claim No. eight above discovery in Confederate Gulch, German district, Meagher County, Montana Territory. That upon the issuing of said injunction in the said action, the defendants made, entered into, and gave an undertaking required by the judge of which the following is a copy, to wit:

In the district court, 3d judicial district of the Territory of Montana, in the county of Meagher.

DAVID P. RANKIN, PL'FF,
vs.
JOHN A. CAMPBELL ET AL., DEF'TS.

32 Whereas the above-named plaintiff has commenced or is about to commence an action in the district court of the 3d judicial district of the Territory of Montana, in and for said county of Meagher, against the above-named defendants, and is about to apply for an injunction in said action against the said defendants, enjoining and restraining them from the commission of certain acts as in the complaint filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned residents of said county of Meagher, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of five thousand dollars, and promise to the effect that, in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand dollars, as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

Dated this 25th day of January, A. D. 1870.

WM T. FORD & ALFRED METCALF. [L. S.]

MONTANA TERRITORY,
County of Meagher, ss:

33 William T. Ford and Alfred Metcalf, whose names are subscribed as the sureties to the above undertaking, being severally sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

WM T. FORD.
ALFRED METCALF.

Subscribed and sworn to before me this 25th day of January, A. D. 1870.

T. J. DAWES,
Clerk District Court.

That said action so commenced against said defendants was prosecuted and carried on until the May term, A. D. 1870, of said district court, when, to wit, on the 27th day of May, A. D. 1870, after the evidence had been heard in said cause and the cause argued by counsel for the respective parties, plaintiff and defendants, and the jury in-

structed by the said court, the jury retired with a sworn officer, and after deliberation then and there returned into court, on said 27th day of May, A. D. 1870, a verdict for the defendants in said action, being the plaintiffs in this action, and then, to wit, on the 27th day of May, A. D. 1870, after a return of said verdict, upon motion to said court by defendants' attorneys, said injunction was by said court, on said
34 27th day of May, A. D. 1870, dissolved, and it was thereby adjudged that the said plaintiff in said injunction suit was not entitled to the said injunction, and the issues in said cause were finally, on said 27th day of May, A. D. 1870, determined by said court in favor of defendants in said action.

These plaintiffs further state that by means of the issuing and serving of said injunction as aforesaid these plaintiffs have been forced to pay and obliged to pay, lay out, and expend divers large sums of money in and about the defence of said action for said injunction, and in procuring necessary counsel and advice in relation to such defence, and to procure the dissolution of said injunction, amounting in the whole to the sum of one thousand dollars.

And the plaintiffs further state that by the means of said injunction aforesaid these plaintiffs, their employees and servants, for a long space of time, to wit, from the 25th day of January, A. D. 1870, until the 27th day of May, A. D. 1870, were enjoined, prevented, and restrained from prosecuting their work in drifting, excavating, digging, mining, and extracting gold from said mining claim No. two in Greenhorn Gulch, and described as claim No. 8 in Confederate Gulch in plaintiffs' complaint in said injunction suit mentioned, and during the time
35 aforesaid were compelled to remain and did remain idle and unemployed, and also in consequence and by means whereof the said work of said plaintiffs, and the drain leading to the said mining ground of said plaintiffs, became and was much injured and dilapidated and filled up, by means of all which said several premises the said plaintiffs say that they have been greatly injured, and have sustained damage to a large amount, to wit, in the sum of five thousand dollars, whereby the said defendants have become liable to pay the said plaintiff the said sum in said undertaking specified, to wit, the sum of five thousand dollars. That no part of said sum of five thousand dollars has been paid to these plaintiffs by said defendants. Wherefore plaintiffs demand judgment against said defendants for the sum of five thousand dollars, besides their costs.

SMITH & CULLEN,
SHOBER & LOWRY,
Pl'ffs' Attorneys.

MONTANA TERRITORY,
County of Meagher:

John A. Campbell, being duly sworn, says that he is one of the plaintiffs in the above-entitled cause; that he has heard the foregoing complaint read and knows the contents thereof, and that he has rea-
36 son to believe and does believe the matters and things therein stated to be true.

JOHN A. CAMPBELL.

Subscribed and sworn to before me this 10th day of June, A. D. 1870.

T. J. DAWES,
County Recorder, Meagher County.

Filed June 10th, A. D. 1870, in district court.

T. J. DAWES,
Clerk District Court.

And on the 29th day of November the following answer was filed in said cause, in words & figures as follows, to wit:

Answer.

In 3d judicial district court.

MONTANA TERRITORY,
Meagher County:

JOHN A. CAMPBELL ET AL.
vs.
W. T. FORD ET AL.

The defendants, by Chumasero & Chadwick, their attorneys, for answer to the complaint of plaintiffs says: They deny that by the means of issuing & serving the said injunction the plaintiffs have been forced to pay and obliged to pay, lay out and expend any sums of money whatever in and about the defence of said action for injunction and procuring necessary counsel and advice in relation to such defence, amounting to one thousand dollars or any other sum; they deny that by rea-
37 son of said injunction the said plaintiffs, their employees and servants, for the time in said complaint mentioned, were enjoined or prevented from prosecuting said work on said claim, and that during said time they were compelled to remain and did remain idle and unemployed. They deny that in consequence of any act of defendants the drain aforesaid became dilapidated, filled up, or injured so that plaintiffs have been injured or have sustained damages as alleged in said complaint in any sum whatever.

And for further answer to said complaint said defendants allege that the said suit in which said bond or undertaking was so as aforesaid given and executed by these defendants has not been finally determined, but the same is now pending in this court on motion for new trial.

And defendants further say that the said David P. Rankin is now the owner of said claim described in said complaint, and to recover possession of which said action was brought; and he, the said Rankin, at the time of instituting the aforesaid action, was, and still is, the bona fide owner of said claim, and the said defendants in the original action at the time of the issuing and service of the injunction therein were trespassers.

CHUMASERO & CHADWICK,
Def'ts' Att'ys.

38 TERRITORY OF MONTANA.
County of Meagher:

Alfred Metcalf, one of the above-named defendants, being duly sworn, says that he has read the foregoing answer and knows the contents thereof, and that he has reason to believe and does believe the matters therein set forth are true.

ALFRED METCALF.

Subscribed and sworn to before me this 29th day of November, A. D. 1870.

T. J. DAWES,
Clerk.

This cause having come on regularly for trial November 30th, 1870, the following verdict of the jury in said cause, after hearing the evidence and argument of counsel on both sides & charge of the court, was rendered:

Verdict.

JOHN A. CAMPBELL, WALTER COLLINS, AND Donald McLane
vs.
W. T. FORD AND ALFRED METCALF.

We, the jury, find for the plaintiffs the sum of twelve hundred and fifty dollars damages.

J. F. McCLINTOCK,
Foreman.

Filed Nov. 30, 1870.

In the district court of the third judicial district of the Territory of Montana, in & for the county of Meagher.

JOHN A. CAMPBELL, WALTER COLLINS, AND Donald McLane, plaintiffs,
39 *vs.*
W'M T. FORD & ALFRED METCALF, defendants.

This action came on regularly for trial; the said parties appeared by their attorneys. A jury of twelve persons was regularly empanneled and sworn to try said action. Witnesses on the part of plaintiffs and defendants were sworn and examined.

After hearing evidence, argument of counsel, and the instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names and say:

We, the jury, find for the plaintiff the sum of twelve hundred and fifty dollars.

J. R. McCLINTOCK,
Foreman.

Wherefore, by virtue of the law and the reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendants the sum of twelve hundred and fifty dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof till paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of $217.68.

Judgment rendered November 30th, 1870, and recorded December 1st, 1870.

T. J. DAWES,
Clerk.

40 Plaintiffs then offered said judgment roll and record in evidence, to the introduction of which defendant then and there objected, which objection was sustained by the court, to which ruling of the court in not permitting said record to be given in evidence plaintiff then and there excepted.

There being no further testimony offered, the court ordered the jury to return a verdict for the defendant, to which said order of the court, plaintiffs then & there excepted, and pray that *that* this their bills of exceptions may be signed and sealed by the court, which is done.

Dated May, 21, 1874.

D. S. WADE,
Judge 3 *Dist. Court.*

And afterwards, to wit, on the same day, the jury returned into court the following verdict, which is in words and figures as follows, to wit:

In 3d district court (judicial) Meagher County, Montana Territory.

JOHN A. CAMPBELL, DONALD MCLANE, ADD. Williams, & Thomas Williams
vs.
DAVID P. RANKIN.

We, the jury, find in favor of the defendant.

May 20, 1874.

R. G. HUSTON, *Foreman.*

And afterwards a judgment was entered, which is in words and figures as follows, to wit:

In 3d judicial district *district* court.

41 MONTANA TERRITORY,
Meagher County:

JOHN A. CAMPBELL, DONALD MCLANE, ADD. Williams, & Thomas Williams
vs.
DAVID P. RANKIN.

This action came on regularly for trial, the said parties appeared by their attorneys, a jury of twelve persons was regularly empanneled and sworn to try said action, and witnesses were called on the part of plaintiff and certain documentary evidence offered by plaintiffs, and exceptions taken to rulings of the court, & the court instructed the jury to return a verdict for defendant; and the jury retired to consider of their verdict, and subsequently returned into court and, being called, answered to their names, and say:

We, the jury, find for the defendant.

(Signed) R. G. HUSTON, *Foreman.*

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said defendant have and recover from the said plaintiffs his costs and disbursements, herein taxed at $160 $\frac{15}{100}$ *dollars.*

J. E. HALL,
District Clerk.

Judgment entered May 20, 1874.

Dated May 20th, A D. 1874.

J. E. HALL, *Clerk.*

42 And afterwards, to wit, on the 11th day of June, A. D. 1874, the plaintiffs filed their notice of appeal which in words & figures as follows, to wit:

Notice of Appeal.

In 3d judicial district court.

MONTANA TERRITORY,
Meagher County:

JOHN A. CAMPBELL, DONALD MCLANE, ADD. Williams, & Thomas Williams
vs.
DAVID P. RANKIN.

Please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the Territory of Montana from the judgment therein made and entered in the said district court on the 20th day of May, A. D. 1874, in favor of the defendant in said action and against plaintiffs, and from the whole thereof; and plaintiffs rely upon the exceptions, signed and sealed by the court, for a reversal of said judgment.

CULLEN & SHOBER,
Att'ys for Pl'ffs.

To the clerk of said district court, and to Messrs. Chumasero and Chadwick, & E. W. Toole, att'ys for def'ts.

Service of copy of notice of appeal waived this 11th day of June, A. D. 1874.

CHUMASERO & CHADWICK,
Def't's Attorneys.

43 And afterwards, to wit, on the 12th day of June, A. D. 1874, plaintiffs filed their undertaking on appeal, which is in words & figures as follows, to wit:

Undertaking on appeal.

In 3d judicial district court.

TERRITORY OF MONTANA,
County of Meagher:

JOHN A. CAMPBELL ET AL.
vs.
DAVID P. RANKIN.

Whereas the plaintiff, in the above-entitled action appeal to the supreme court of the Territory of Montana from a judgment made and entered against them in an action in the said district court in favor of the said defendant on the 20th day of May, A. D. 1874, for $160 $\frac{15}{100}$ *dollars*, his costs of suit:

Now, therefore, in consideration of the premises and of such appeal, we the undersigned residents of the county of Meagher and Territory of

Montana, and being by occupation stock growers, do hereby jointly and severally undertake and promise on the part of appellants that the said appellants will pay all damages and costs which may be awarded against them on appeal, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly & severally bound.

And whereas the appellants are desirous of staying execution of said judgment so appealed from as to the said costs, we do further,
44 in consideration thereof and of the premises, jointly and severally undertake and promise, and acknowledge ourselves further jointly and severally bound in the further sum of three hundred and fifty dollars (being double the amount named in the said judgment for costs), that if the said judgment appealed from, or any part thereof, in that respect be affirmed, the appellants shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants on appeal.

COLEMAN PUETT. [SEAL.]
W'M T. FORD. [SEAL.]

In presence of—
J. E. HALL.

TERRITORY OF MONTANA,
County of Meagher, ss:

Be it remembered that on this 28th day of May, A. D. 1874, personally came Coleman Puett and William T. Ford, who being first duly sworn, each for himself says that he is worth the amount specified in the foregoing undertaking over and above his debts and liabilities, and exclusive of his property exempt from execution in the Territory of Montana.

COLEMAN PUETT.
W'M T. FORD.

45 Subscribed & sworn to before me this 28th day of May, A. D. 1874.

[SEAL.] J. E. HALL,
Clerk Dist. Court.

In the district court, 3d judicial district.

MONTANA TERRITORY,
County of Meagher:

I, J. E. Hall, clerk of the 3d judicial district court, in and for the county of Meagher, Montana Territory, do hereby certify that the foregoing 52 pages, numbered from one to fifty-two inclusive, contain a true and correct transcript on appeal of all the papers, orders, exceptions, and proceedings on file and of record in my office in the case of John A. Campbell, Donald McLane, Add. Williams and Thomas Williams, plaintiffs, and David T. Rankin, defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said district court this 25th day of June, A. D. 1874.

[SEAL DIST. COURT.] J. E. HALL,
Dist. Clerk.

Filed Aug. 3d, 1874.

J. R. ALDEN,
Clerk Supreme Court of the Territory of Montana.

46 And thereupon judgment in said cause on appeal was entered in words & figures following, to wit:

In supreme court M. T.

JOHN A. CAMPBELL ET AL., PLAINTIFFS & appellants,
vs.
DAVID P. RANKIN, DEF'T & RESPONDENT.

Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred & seventy-six, this cause came to be heard before the said supreme court upon the transcript of record of the 3d judicial district court of said Territory in said cause filed herein, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in said cause be, and the same is hereby, affirmed with costs.

And it is further ordered that the said defendant and respond-
46½ ent, David P. Rankin, recover against the said plaintiffs and appellants dollars for his costs herein expended and have execution therefor.

17 January, 1876.

47 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Montana:

Because in the records and proceedings, and also in the rendition of the judgment of a plea, which in the said supreme court before you, between John A. Campbell, Donald McLane, Add. Williams and Thomas Williams, and David P. Rankin, a manifest error hath happened to the great damage of the said John A. Campbell, Donald McLane, Add. Williams, and Thomas Williams, as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October, A. D. 1876, at the said Supreme Court, to be then and there held, that the said record and
48 proceedings being inspected, the said Supreme Court may cause further to be done therein what of right and according to the custom and laws of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, this 19th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] J. R. ALDEN,
Clerk Supreme Court of Montana Territory.

Allowed Feb. 19, A. D. 1876.

D. S. WADE,
Chief Justice Supreme Court, Montana Territory.

(Indorsed:) John A. Campbell et al., pl'tffs in error, vs. David P. Rankin, def'd's in error. Writ of error. Filed Feb'y 19, 1876. J. R. Alden, clerk.

49 *Citation.*

UNITED STATES OF AMERICA:

To David P. Rankin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, being the 9th day of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein John A. Campbell, Donald McLane, Add. Williams, and Thomas Williams are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected, and speedy justice should not be done to the parties.

Witness the Hon. Morrison R. Wait, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

D. S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

50 Rec'd copy this 19th day of February, A. D. 1876.
TOOLE & JOHNSTON,
CHUMASERO & CHADWICK,
Att'ys for Ranken.

J. H. Shober, being duly sworn, says that he did on the 19th day of February, A. D. 1876, serve a copy of the within citation on W'm Chumasero, one of the att'ys for David P. Rankin, defendant in error.

JOHN H. SHOBER.

Subscribed & sworn to before me this 19th day of February, 1876.
[SEAL.] J. R. ALDEN,
Clerk Supreme Court, Montana Territory.

(Indorsed:) John A. Campbell et al., pl'ff in error, vs. David P. Rankin, def'd' in error. Citation. Filed Feb'y 19th, 1876. J. R. Alden, clerk.

51 And afterwards, to wit, on the 19th day of February, A. D. 1876, the said appellants filed herein in said cause their undertaking on writ of error to remove the said cause to the Supreme Court of the United States, of which said undertaking in words and figures, the following is a copy, to wit:

In supreme court, Territory of Montana.

JOHN A. CAMPBELL, DONALD MCLANE, ADD. Williams, & Thomas Williams, pl'ffs in error,
vs.
DAVID P. RANKIN, DEFENDANT IN ERROR.

Know all men by these presents that we, John A. Campbell, Donald McLane, and Add. Williams, as principals, and Coleman Puett & William T. Ford, as sureties, are held and firmly bound unto David P. Rankin, in the sum of six hundred dollars, to be paid to said obligee, his certain attorneys, executors and administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors

and administrators, jointly and severally, by these presents, sealed with our seals and dated this 11th day of February, A. D. 1876.

Whereas the above-named John A. Campbell, Donald McLane,
52 Add. Williams, and Thomas Williams have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled cause by the supreme court of the Territory of Montana, at the January term of said court, A. D. 1876:

Now, therefore, the condition of this obligation is such, that if the above-named John A. Campbell, Donald McLane, Add. Williams, and Thomas Williams, shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

Given under our hands and seals this 11th day of February, A. D. 1876.

DONALD McLANE. [L. S.]
JOHN A. CAMPBELL. [L. S.]
ADD. WILLIAMS. [L. S.]
W'M T. FORD. [L. S.]
C. PUETT. [L. S.]

MONTANA TERRITORY,
County of Meagher:

C. Puett and W'm T. Ford, being duly sworn, each for himself says he is one of the sureties in the foregoing bond, and that he is worth the amount mentioned as the penalty thereof, over and above all his debts and liabilities and property exempt from execution, and
53 that he is a citizen of Montana Territory, county of Meagher.

C. PUETT.
W'M T. FORD.

Subscribed & sworn to before me this 11th day of February, A. D. 1876.

H. H. BARNES,
Clerk of the 3d Judicial District Court,
Meagher County, Montana Territory.

Stay of proceedings & supersedeas granted, approved this 19 day of February, A. D. 1876.

D. S WADE,
Chief Justice Supreme Court, Montana Territory.

Filed Feb'y 19, 1876.

J. R. ALDEN, *Clerk.*

54 In supreme court, Territory of Montana.

JOHN A. CAMPBELL ET AL.
vs.
DAVID P. RANKIN.

I, J. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify that the foregoing seventy-three pages, numbered from one to seventy-three inclusive, contain a full, true, and correct transcript of the proceedings had in the above-entitled cause in the 3d judicial district court & in the supreme court of said Territory, on appeal, as the same appears on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this fifteenth day of March, A. D. 1876.

[SEAL.] J. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 193. John A. Campbell, Donald McLane, Add. Williams, and Thomas Williams, pl'ff in error, vs. David P. Rankin. Montana Ter't'y sup. court. Filed 6th October, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JOHN A. CAMPBELL ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID P. RANKIN, DEFENDANT IN ERROR.

No. 193.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF OF PLAINTIFFS IN ERROR.

LAW REPORTER, PR., 631 F St.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JOHN A. CAMPBELL, DONALD MCLANE, ADD WILLIAMS, AND THOMAS WILLIAMS, *Plaintiffs in Error*, vs. DAVID P. RANKIN. } No. 193.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

Statement.

The plaintiffs in error brought an action against the defendant in the Third Judicial Court, Meagher county, Montana Territory, to recover damages for an alleged trespass upon placer-mining property, which is described in the declaration as follows:

"Commencing at the intersection of the rim rock of Greenhorn Gulch with Confederate Gulch, and extending up said Greenhorn Gulch to the lower line of what is known as Claim No. 1, below discovery in Greenhorn Gulch, a distance of about two hundred feet, and embracing said distance the outer channel of said Greenhorn Gulch from rim rock to rim rock of said gulch."

The declaration further alleges that the property is rich in gold; and that possession thereof was unlawfully held by the defendant from October 30, 1871, to December 1,

1871, during which time the defendant mined and carried away gold-bearing earth and gold dust of the value of $15,000.

Rec., p. 1.

The defendant by his plea denies the averments of the declaration, and alleges affirmatively that—

"This defendant was and is now the owner of, and was and ever since has been and still is, in the actual possession, use, and enjoyment of a certain piece or parcel of placer-mining ground, and entitled to the same, and that the mining and working thereof by this defendant in the usual and customary manner constitutes the supposed trespasses and grievances complained of."

Rec., p. 2.

The replication to this plea denies that the defendant was ever the owner or in the lawful possession of the grounds described in the plaintiffs' complaint, and further alleges that the defendant is estopped from denying the title of the plaintiffs, because prior to the institution of this suit, to wit, in May, 1870, a suit was brought by the defendant, Rankin, against John A. Campbell and Donald McLane, plaintiffs in this suit, and Walter Collins, predecessor in interest of the other plaintiffs, Add Williams and Thomas Williams, in which suit the ownership and right of possession of the property which is the subject of this suit was directly in issue, and in which it was found by the jury and adjudged by the court and judgment duly entered that the said property described in the declaration in this case was not the property of the defendant, Rankin, but was the property of the said Campbell and McLane, plaintiffs in error, and of Walter Collins, the precedent in interest of the plaintiffs Add and Thomas Williams.

Rec., p. 3.

On the trial of the case the plaintiffs offered in evidence

the record and judgment in the case of Rankin *vs.* Campbell *et al.*, referred to in the plaintiffs' replication.

The judgment roll shows the case of Rankin *vs.* Campbell to have been an action of trespass on the case to recover damages for trespass upon placer-mining property described as follows:

"The gulch portion of Mining Claim No. 8, in German Mining District, Confederate Gulch, Meagher county and Territory of Montana; the said gulch portion of said claim belonging to this claimant as above stated being bounded on the upper line or northeast side by Mining Claim No. 9, in said district, and on the lower line or southwest by Mining Claim No. 7, in said district, and on the side next to the town of Diamond City, in said county, by the front of the lower line of houses on Main street, and on the southeast side by the rim rock of the gulch."

Rec., p. 5.

The answer of the defendants admits that on the day mentioned in the complaint and at the time of filing the answer, the plaintiff was entitled to the possession of the gulch portion of the claim numbered eight, above discovery, in Greenhorn District, Confederate Gulch, and that said claim is bounded by Claim No. 9 and Claim No. 7 above and below said claim, but denies that the claim is bounded on the side next Diamond City by the front of the lower line of houses on Main street; and avers that the said claim is bounded on said side by the lower rim rock of the gulch.

It further denies that the defendants have unlawfully entered into any part or portion of said claim Number Eight, but admits that they have worked within the limits specified in the complaint as the boundary on the town side of said claim, and that a shaft has been sunk as alleged.

It further denies that the shaft is upon said claim number eight, or any part thereof, and avers affirmatively as follows:

"That on the 18th day of December, 1869, the defen-

dants purchased from J. R. Weston and J. A. Harding, who were the original owners of the same claim Number Two, below discovery in Greenhorn Gulch, in German Mining District, and that the same extends to the lower boundary of Claim Number One, in said Greenhorn Gulch, down the same two hundred feet, and to the line of the lower rim rock of said Confederate Gulch, and that *all the work done by them as alleged in said complaint is upon said claim, Number Two, below discovery in said Greenhorn Gulch, and not upon claim Number Eight in Confederate Gulch, or any part or portion thereof.*

"And that the defendants are the owners of and lawfully in possession of said claim numbered two, below discovery in said Greenhorn Gulch, and that the bonnds given as claimed by plaintiff on the town side of the claim numbered eight, Confederate Gulch, covers a large portion of the ground owned by the defendants, and which they say is *not a part of the gulch, portion of claim numbered eight, but is part and parcel of claim numbered two, below discovery in Greenhorn Gulch.*"

Record, p. 607.

The jury found a verdict for the defendants, and the following judgment was entered:

"It is ordered and adjudged that the said defendants have, and receive, from the said plaintiffs (the mining ground described in the complaint in this action) and their costs and disbursements, &c."

Record, p. 8.

The plaintiffs in this action, then offered to prove by competent testimony that the parties in interest in the said action, are the same in interest as in the present action, and that the *issues only or mainly tried in said cause was the ownership, possession and right of possession to the identical piece of mining ground, whereon it is alleged the trespass complained of in this action was committed.*

Record, p. 8.

Objection was made to the introduction in evidence of

said judgment roll, and to said testimony, and the objection was sustained by the court.

John H. Campbell, one of the plaintiffs, was then produced as a witness, on behalf of the plaintiffs, and was asked among other things—

"Do you know where Claim No. 2, in Greenhorn Gulch, is situated?

"State how long you have been in possession of Claim No. 2, in Greenhorn Gulch.

"State whether you have ever had any conversation with defendant in relation to Claim No. 2, below discovery in Greenhorn Gulch; and if so, state what that conversation was."

To each of these questions the defendant objected, and the court sustained the objection.

Record, p. 9.

The plaintiffs then offered to prove by oral testimony, that the defendant had frequently admitted that there was such a mining claim as Claim No. 2, below discovery in Greenhorn Gulch; that the intersection of the rim rock of the two gulches was the dividing line between said claim and Claim No. 8, in Confederate Gulch, and that the plaintiffs were the owners of said claim.

The defendant's objection to this testimony, the court sustained.

Record, p. 9.

The plaintiff then offered to prove orally, that Greenhord Gulch was a mining gulch, and had a claim known as Claim No. 2, below discovery in it, and also that the plaintiffs and their predecessors in interest had been in possession thereof, since 1866.

The defendant's objection to this testimony, the court sustained.

Record, p. 11.

The plaintiffs then offered in evidence a deed to Campbell and McLane, two of the plaintiffs, and to Walter, Collins, the predecessor in interest of the other defendants dated December 18, 1869, of Mining Claim No. 2, below discovery in Greenhorn Gulch, German District, and to prove that they, the plaintiffs, had been in possession of the ground therein mentioned since the date of the deed.

The defendant's objection to this evidence the court sustained.

The plaintiffs' witness, Campbell, was then asked:

"Has there been any district organization in the gulch in which the ground described in your deed is situate since you have been in possession of the same under your deed?"

And the further question:

"State how long you have been acquainted with Greenhorn Gulch, if you have ever been acquainted with it."

And the further question:

"State if you and the other plaintiffs in this case have ever been in possession of a piece of mining ground in Greenhorn Gulch, having distance and defined boundaries; and if so, state how long you have been so in the possession thereof, and how such claim was commonly known and designated.'

The defendant's objections to these questions and each of them were sustained by the court.

Record, p. 12.

The plaintiffs then proposed to introduce in evidence the written law and rules of German District, in which the mining claim alleged to be trespassed upon is situate, and to establish by such laws and rules that the dividing line between claims in Confederate Gulch in said district and tributaries thereof, is confined to the intersection of the rim rocks of the gulches at the point of intersection,

and to prove orally that the gulch in which the claim alleged to be trespassed upon, is situated in a tributary or side gulch of Confederate.

The defendant's objection to this testimony was sustained by the court.

Record, p. 12.

The plaintiffs then offered in evidence the judgment roll in the suit of Campbell *et al. vs.* Ford *et al.*, brought to recover the penalty of a bond given in the said suit of Rankin *vs.* Campbell *et al.*

The defendant's objection to this testimony was sustained by the court.

Record, p. 16.

There being no further testimony, the court ordered the jury to return a verdict for the defendant, which was done and judgment entered thereon. From this judgment an appeal was taken to the Supreme Court of the territory.

Record, pp. 17, 18.

The Supreme Court of the territory affirmed the judgment entered in favor of the defendants, and the plaintiffs in error have sued out this writ of error to obtain the reversal of that judgment of affirmance.

Assignment of Errors.

1. The court below erred in excluding the record and judgment in the case of Rankin, the defendant in error, against two of the plaintiffs in error and the predecessor in interest of the other plaintiffs in error.

Record, p. 8.

2. The court below erred in refusing the offer made by the plaintiffs to prove by competent testimony that the parties in said suit were the same in interest as in this action, and that the issues only or mainly tried in said

cause were the ownership, possession, and right of possession to the identical piece of mining ground whereon the alleged trespass, complained of in this action, was committed.

Record, p. 8.

3. The court erred in refusing to permit the plaintiffs to show by oral testimony where the claim described in the declaration is situated, and the lengh of time the plaintiffs had been in possession thereof.

Record, p. 9.

4. The court erred in refusing to permit the plaintiffs to prove, by the defendant's admission, the existence of Mining Claim No. 2, in Greenhorn Gulch, the situation of the dividing line between said Claim No. 2 and Claim No. 8, in Confederate Gulch, and that the plaintiffs were the owners of said Claim No. 2.

Record, p. 9.

5. The court erred in excluding the deed executed by Harding and Weston for Mining Claim No. 2, below discovery, in Greenhorn Gulch, German District, and in refusing to permit the plaintiffs to show that the plaintiffs had been in possession of the claim described in the deed, since the date of the execution of the deed.

Record, p. 12.

6. The court erred in refusing to permit the plaintiffs to prove that they had been in possession of a piece of mining ground in Greenhorn Gulch, having distance and defined boundaries, and the length of time they had been in possession, and how such claim was commonly known and designated.

Record, p. 12.

7. The court erred in refusing the plaintiff's offer to introduce in evidence the written laws and rules of German

District, and to establish, by such laws and rules, that the dividing line between claims in Confederate Gulch is confined to the intersection of rim rocks of the gulches at the point of intersection, and to prove that the place where the trespass is alleged to have been committed is in a gulch, which is a tributary or side gulch of Confederate Gulch.

Record, p. 12.

8. The court erred in directing the jury to find a verdict for the defendant.

Record, p. 17.

ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

First and Second Assignments of Error.

The error of the court below in excluding the record of the judgment, and in excluding parol testimony, to show what questions of fact and issues were submitted to the jury in the case of Rankin *vs.* Campbell *et al.*, is made manifest by numerous adjudications of this court.

As appears from the report of this case in Vol. 2 of Montana Reports, p. 363, the court below did not question the general principle that a former judgment is a bar in all cases between the same parties and their privies, when the matters put in issue in the first suit were the same as the matters in issue in the second suit.

It was indeed admitted that, if the judgment entered in favor of Campbell *et al.*, in the suit brought by Rankin, was made in a case which was tried upon its merits between the same parties, and in which the same subject-matter was litigated as that under consideration in this case, that judgment would be a complete bar to another

suit between the same parties or their privies for the same case.

The judgment roll was, however, held inadmissible in evidence, because the court were unable to decide from the pleadings on which of the questions of fact submitted to the jury the verdict was based, and because the question of ownership and right of possession was not necessarily involved in the determination of the action by the jury.

No reference whatever is made in the opinion to the offer of parol testimony, and it is plain from the conclusions reached by the court that they considered the rule as to estoppel in actions in trespass to be that the matters in issue in the former action relied on as an estoppel can be ascertained only by inspection of the judgment roll.

But no such principle or rule of law is now recognized by the courts of the United States.

The general principle that an adjudication by a competent tribunal is conclusive not only in the proceeding in which it is pronounced but in every other where the right or title is the same, although the cause of action is different, has not been more distinctly or more frequently affirmed that the doctrine that in cases in trespass, as well as in assumpsit, the issues determined may be shown by extrinsic evidence when the pleadings do not show what they were.

In the case of Miles *vs.* Caldwell, 2 Wall., 35, this court say that the alleged qualification of the rule which is said to apply in all cases when the action relied on as an estoppel was in tort, viz.: that nothing will be held as concluded by the verdict which was not put in issue by the pleadings is not sustained by the authorities and is not sustained by sound principle.

The court further say:

"We are of opinion that the prevailing doctrine of the

courts at present is, that whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury and were necessarily passed upon by them."

The correctness of this doctrine is affirmed in the following cases:

Cromwell *vs.* County of Sac, 94 U. S. R., 351.
Davis *vs.* Brown, 94 U. S. R., 423.
Russell *vs.* Place, 94 U. S. R., 608.

In the case last cited the court say:

"It is undoubtedly settled law, that a judgment of a court of competent jurisdiction upon a question directly involved in the suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there is any uncertainty on this head on the record—as for example, if it appear that several distinct matters may have been litigated upon one or more of which the judgment may have passed without indicating which of them was then litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence, showing the precise point involved and determined. *To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.*"

An inspection of the judgment roll offered in evidence shows that the pleadings did raise an issue as to the possession of and title to the mining claim in controversy in that suit, and as to the boundary of said claim, and the offer to which objection was made and sustained, was to apply the judgment in that case to the issues in this suit,

and to show that issues controverted and decided by the jury, related to the identical piece of mining property on which the alleged trespass was committed in this case, and to the possession and right of possession of the property.

II.

Third, Fourth, Fifth, Sixth, and Seventh Assignments of Error.

The second class of errors committed by the court on the trial of this case, consist in its refusal to permit the plaintiffs to prove the existence of the mining claim in question, and the actual possession of the premises by them, as alleged in their petition.

It will be seen, by reference to the testimony offered and rejected, on pages 9, 11, and 12, of the printed Record, that the plaintiffs were prohibited by the court from giving any evidence whatever in support of the allegations in their petition, and that the court practically decided the case against them without hearing any of their testimony, or permitting any of it to go to the jury.

There must be an extraordinary infirmity in the law if this action of the court below is sustainable.

If any of the excluded evidence was competent upon any ground, or upon any view of the case, under the pleadings, to go to the jury, a new trial must be ordered.

1. The theory upon which it was held that the evidence offered by plaintiffs as to the existence of the claim, and the possession of the premises by them, was incompetent to go to the jury, seems to have been that it was *secondary* evidence; and the court made it out to be secondary evidence by voluntarily interpolating into the case, on the trial, an affidavit, made some time before, in support of a motion for a continuance, in which it was stated that the claim in question had been taken up under the local rules

and regulations of miners in the district; and it appears to have been supposed that, until it was shown that the written rules and customs of the district could not be produced, no proof of any fact alleged in the declaration was competent. (See 2 Mont., 368.)

Now it will be observed that, when the testimony offered was excluded, there was no evidence before the court and jury that the plaintiff's claim was founded upon the rules of an organized mining district, and that it was not so averred in the petition. (Rec., p. 1.) The court assumed to have knowledge of the fact supposed from the affidavit for a continuance, which it brought forward into the case at the trial, on its own motion, without its being offered by either party to the case. (Rec., p. 9, fol. 22.) It was clearly incompetent for the court to treat this affidavit, which constituted no part of the record, as evidence of the fundamental fact upon which it based its ruling, that the testimony offered by the plaintiffs was of the legal character of secondary evidence.

It is supposed that this court, in passing upon the exceptions referred to, will determine the question of the admissibility of the excluded evidence, with sole reference to the *issues made by the pleadings*, and tested by them, it is conceded by the Supreme Court of the Territory, in affirming the judgment of the District Court, that most of the excluded evidence was competent and admissible. The court say: "It cannot be denied that most of the testimony which was rejected at the trial was *competent and relevant in similar actions to establish the existence of the claim in controversy, and support the allegations of the complaint.* But the appellants, in their affidavit filed with the motion for a continuance, disclosed the facts that have been referred to," &c. (2 Mont., 368.)

It is respectfully submitted that, under the issues made by the pleadings, it was competent for the plaintiffs to introduce the evidence specified in the 3d, 4th, 5th, 6th and

7th assignments of error; that the court erred in excluding it; and that the case should be remanded for a new trial upon the issues which the jury were sworn to try.

2. The evidence offered by the plaintiffs was competent in any view of the case, whether the right of possession of the plaintiffs was founded upon the written rules and customs of a mining district, or was asserted independently of such rules and customs.

If the plaintiffs had counted upon a title and right of possession in pursuance of the mining regulations of the vicinage, it would have been competent for them to prove their actual possession of the premises claimed, and the court could not properly exclude such evidence upon the ground of the non-production of the written regulations.

Such evidence would not possess the character of secondary proof.

Possession of mining claims is always in such cases regular and competent proof in support of an action against an intruder; and the jury must find that plaintiffs were in possession of the mining grounds in dispute at the time of the alleged grievances, and that such possession was rightful as against the defendants.

The plaintiffs' claim is upon a *possessory* title; and it is, of course, their right and duty to establish it by evidence.

The Supreme Court of California in the leading case of Atwood *vs* Fricot (17 Cal., 43), say:

"Mining claims are held by *possession*, but that possession is regulated and defined by usage and local conventional rules; and the 'actual possession' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be required in a mining claim in order to give a right of action for an invasion of it. The claim must be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked; but when the claim is defined, and the party enters in

pursuance of mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters *bona fide* under color of a title, as under a deed or lease, the possession of a part as against any one but the true owner or prior occupant, is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of the possessor in such instances would not be worse than that of the occupant of other real estate, in which case this rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances and set up as against him outstanding title in a stranger with which he had no connection."

The doctrine of this case clearly is, that possession, to some extent, of a mining claim taken up under the customs and rules of the district, is an elemental fact to be proved in an action for invasion of the right. (See, also, 23 California, 178.

3. The plaintiffs had a right, independently of any mining rules and customs, to establish their *actual possession* of a tract of mining ground, having distinct and definite boundaries, under the doctrine affirmed by the Supreme Court of California in a multitude of cases, among which may be mentioned those of English *vs.* Johnson (17 Cal., 115), concurred in by Mr. Ch. J. Field, and Hess *vs.* Winder (30 Cal., 355.)

This proof was offered and excluded, and its exclusion is assigned for error in the 6th assignment.

The plaintiffs asked their witness: "State if you and the other plaintiffs in this case have ever been *in possession of a piece of mining ground in Greenhorn Gulch having distance* (*distinct que*) *and defined boundaries;* and if so, state how long you have been so in possession, and how such claim was commonly known and designated." Rec., p. 12, fol. 29.

This question was excluded, and an exception was taken by plaintiffs.

In English *vs.* Johnson (17 Cal., 115) the court says:

"The taking up of mineral land in pursuance of the mining regulation of the vicinage gives possessory title to the claims just as an entry in the land office, or the following of the prescribed rules given by statute, gives a possessory title to public or agricultural land. *But it does not follow because this is the regular and usual way of obtaining possession, that a possession so obtained would necessarily be without the protection of the law.* Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor.

"The actual prior possession of the first occupant would be better than the subsequent possession of the last.

"*We see nothing in the law which would neeessarily prevent a party from taking actual possession of mineral land, though in taking possession he did not observe the requirements as to registry and the like acts prescribed by the local laws.* But if he took more land than these rules allowed, this would not give him title to the excess against any one who complied with the laws, and took up such excess in accordance with them.

"In this case, no law or regulation of the vicinage was shown limiting the plaintiff's right to hold to the extent of which he was in possession. *Prima facie* being in possession, he was rightfully possessed; and no presumption can be indulged that such possession was in violation of any law, local or general. The plaintiff claims under purchase and location a small tract of land, with demarked limits, of which he was in possession; and in the absence of any proof that such claim is opposed to the local rules, we are unable to discover any principal upon which to hold that the possession is wrongful. *The plaintiff need not show, in such a case as this, in the first instance, that he was in possession in accordance with the local laws; but may (as a vendee under a deed may as to other land) make a prima facie case upon possession; and this is enough until the defendant shows that the possession is wrongful, because in violation of rules which justify him in going upon the premises and working them.*"

III.

The Seventh Assignment of Error.

It seems that the plaintiffs offered to produce in evidence the written laws and rules of German District, and to prove by them "that the dividing lines between claims in Confederate Gulch, in said district, is confined to the intersection of the rim rocks of the gulches at the point of intersection, and to prove orally that the gulch in which the claim in question is situated, is a tributory or side gulch of Confederate." (Rec., p. 12, fol. 30.)

This was excluded by the court, upon what ground or principle we cannot imagine.

That the evidence was competent to prove the extent and boundaries of the *locus in que*, as a mining claim of that district, can scarcely be questioned.

The District Court seems to have acted upon the view that the plaintiffs were not entitled to have their case tried at all, either under or outside of the mining laws and rules of the German District; and the case we respectfully submit should be sent back to be tried by the court and jury according to law.

J. HUBLEY ASHTON,
NATHANIEL WILSON,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 193.

JOHN A. CAMPBELL, DONALD McLANE, ADD. WILLIAMS, AND THOMAS WILLIAMS, PLAINTIFFS IN ERROR,

vs.

DAVID P. RANKIN.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR DEFENDANT IN ERROR.

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No. 193.

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vs.

DAVID P. RANKIN.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR DEFENDANT IN ERROR.

This is a suit to recover damages for an alleged unlawful entry, by the defendant, Rankin, on the 30th of October, 1871, upon certain mining property designated in the complaint as "Claim No. 2, below Discovery, in Greenhorn Gulch, Meagher county, Montana Territory," claimed by the plaintiffs to be their property; and it seems that the suit was intended for a trial of the title to the property in question.

The defendant pleaded title in himself; and the plaintiffs, in addition to the general issue, filed a special replication, setting up a judgment rendered on May 27th, 1870, in a suit in the same court wherein Rankin was plaintiff, and Campbell, McLane, and one Walter Collins, alleged to have been "the predecessor in interest of the plaintiff's in the present suit, Add. Williams and Thomas Williams," were

defendants, and wherein, as it was alleged, the title to the same property was in issue, and was found to be in the defendants in that case.

On the trial before a jury, the record in the case of Rankin *vs.* Campbell, McLane, and Collins, was offered in evidence by the plaintiffs, and was excluded by the Court; as was also the record of a suit upon an injunction bond given in the same case. To these rulings the plaintiffs excepted; and the first bill of exceptions is based upon them.

The only other testimony offered by the plaintiffs in support of their case, was the oral testimony of one of them, John A. Campbell, to prove their ownership of the property in question; the size, location, manner of locating and holding claims in the Gulch; and that, since December 18, 1869, they had been in possession of the property under a deed, dated that day, from two persons, Harding and Weston, to Campbell, McLane, and Walter Collins. This testimony also was excluded; and there being no other testimony, the court directed a verdict in favor of the defendant. Thereupon, the second bill of exceptions was taken.

The counsel for defendants have not as yet received any brief on behalf of the plaintiffs in error; and are therefore remitted to the record to ascertain the alleged errors which the plaintiffs propose to assign. They presume it will be contended that the territorial court erred substantially in two points:

1st. Because it rejected the record of the two suits of Rankin *vs.* Campbell, McLane, and Collins, and Campbell, McLane and Collins *vs.* Ford and Metcalf (sureties.)

2d. Because it refused to receive the oral testimony of the plaintiff Campbell as proof of ownership; and of the size, location, manner of locating and holding claims in the Gulch.

3d. Because it refused to receive in evidence the deed from Harding and Weston, to Campbell, McLane, and Collins, supplemented by the oral testimony of Campbell, that the plaintiffs held under it.

II.

It does not appear that there is any error in the rulings in question.

1. *In reference to the first point.* The two suits, the records of which were offered in evidence, were between other parties than those concerned in the present controversy. There was no proof, and no offer of proof, that Walter Collins was the "predecessor in interest" of Add. Williams and Thomas Williams, parties to the suit. And it is a well settled principle of law, that judgments and decrees in former suits are not admissible in evidence in a pending controversy, unless the parties are the same, or are shown to be privies in interest or estate, or unless the pending controversy grows out of a previous suit, such as upon appeal or injunction bonds.

Sheehy *vs.* Mandeville, 6 Cranch, 253.
Chirac *vs.* Reinicker, 11 Wheaton, 280.
Gordon vs. Hobart, 2 Sumner, 401.

Moreover, a judgment rendered on May 27, 1870, for a previous alleged trespass, can scarcely be evidence under any circumstances of a trespass alleged to have been committed on October 30, 1871. The title, the right of possession, and the actual possession, may have all changed in the meantime.

2. The ownership, size, and location of mining claims, and the manner of locating and holding such claims, are all regulated by record, and should be evidenced either by matter of record or by written instruments. The common

law requires all interests in real estate to be evidenced by writing; and in the absence of any proof of the destruction of the proper records or deeds, oral testimony in reference to such matters is clearly inadmissible. There is no proof whatever adduced of any such destruction.

3. The deed from Harding and Weston, to Campbell, McLane and Collins was not evidence for any purpose. It is not shown that Harding and Weston had any title, or that they were entitled to convey anything; and the same objection lies to it that lies to the admission of the records hereinbefore referred to, that no privity is shown between Collins and the Williamses.

R. T. Merrick,
M. F. Morris,
Of Counsel for Defendant in Error.

April 2, 79 Rec'd

9 Otto 1261

Oct 1878

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JOHN A. CAMPBELL ET AL., PLAINTIFFS IN ERROR,

vs.

DAVID P. RANKIN, DEFENDANT IN ERROR.

No. 193.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

OPINION OF SUPREME COURT OF MONTANA.

BLAKE, J. The appellants bring this action to recover damages for an alleged trespass upon placer mining property. They allege in their complaint that they are the owners and possessors of "what is known and designated as claim number two below discovery in Green Horn gulch, Meagher county, Montana Territory." They describe the premises as follows: "Commencing at the intersection of the rim rocks of Green Horn gulch with Confederate gulch, and extending up said Green Horn gulch to the lower line of what is known as claim number one below discovery in Green Horn gulch, a distance of about two hundred feet, and embracing said distance the entire channel of said Green Horn

gulch from rim rock to rim rock of said gulch." It is alleged that the respondent committed the trespass upon a portion of this property.

The answer denies specifically the averments of the complaint, the existence of the claim therein described and that the same had any description or boundary. Before the action was tried, the appellants made a motion for the postponement of the trial, and offered in its support the affidavit of one of the appellants. It sets forth that the appellants can prove by a certain witness that the original written records and laws of said Green Horn gulch had been destroyed; that the size and manner of locating and holding the claims in said gulch were established and controlled by said records and laws; that the records "showed the size, lines, boundaries and location of claim numbered two below discovery in said gulch," and that the records "further showed that the predecessors in interest of these plaintiffs took up, possessed, held, owned and occupied said claim in accordance with the local rules and regulations of miners then in force in said gulch."

The evidence offered by the appellants was excluded at the trial and the exceptions to this ruling of the court are before us for review. The oral evidence tended to prove that on a certain day one of the appellants was on "claim No. 2 in Green Horn gulch below discovery;" that he knew where the claim was situated and had been in possession of it several years; that he had had a conversation with the respondent, who had admitted that there was such a claim; that the appellants were the owners of the claim and the respondent had trespassed on the same; that there was a claim known as claim number two below discovery in Green Horn gulch, and that the appellants had been in its possession under certain deeds.

The written evidence comprise the judgment rolls in the cases of *Rankin* v. *Campbell et al.*, and *Campbell et al.* v. *Ford et al.*, the laws of the German mining district, and a deed to some of the appellants and their predecessors in interest.

The action of *Rankin* v. *Campbell et al.* was brought to recover damages for an alleged trespass upon the gulch portion of the mining claim numbered eight in Confederate gulch, which all the parties conceded was located in the German mining district. Campbell *et al.*, the defendants averred that it was known as claim numbered two below discovery in Green Horn gulch. Judgment was entered for Campbell *et al.*, who did not pray in their answer for affirmative relief. In *Campbell et al.* v. *Ford et al.*, the plaintiffs recovered damages against the sureties upon the injunction undertaking given in *Rankin* v. *Campbell et al.* Some of the facts appear in the reports of these cases. *Rankin* v. *Campbell et al.*, 1 Mon. 300; *Campbell* v. *Metcalf et al.*, id. 378. The deed purported to convey to some of the appellants property described as "our mining claim No. 2, below discovery in Green Horn gulch, German district, Meagher county, Montana Territory." The bill of exceptions states that the laws of the German district were offered as evidence to show that the dividing line between the claims in Confederate gulch and its tributaries is confined to the intersection of the rim rocks of the gulches.

The mining property mentioned in the complaint is not described by legal subdivisions, or metes and bounds, which are required by the Civil Practice Act, § 66. Under the issues made by the pleadings, the appellants could not recover if they failed to prove that they owned and possessed a certain tract of mining ground known as "claim number two, Green Horn gulch." This court has held that the court in which the action is tried can direct the order of proof, and we do not think that the rule will be doubted. *Griswold* v. *Boley*, 1 Mon. 558.

It cannot be denied that most of the testimony which was rejected at the trial was competent and relevant in similar actions to establish the existence of the claim in controversy, and support the allegations of the complaint. But the appellants, in their affidavits filed with the motion for a continuance, disclosed the facts that have been referred to.

They informed the court that this claim was within an organized mining district, and that their title and right of possession to the same were founded upon its written rules and customs. It is a legal presumption that these laws were in force in Green Horn gulch and the district including the mining claim of the appellants. *King* v. *Edwards*, 1 Mon. 235. The court could not ignore its knowledge of these facts, which must control its discretion in the admission of testimony. The appellants, by their voluntary conduct, determined the character of the evidence which was demanded upon the trial. The action of the court, under the circumstances, has been defined clearly, and we will examine the rules governing its discretion in the direction of the order of the proof.

Prof. Greenleaf states these conclusions: The rules regulating the introduction of evidence require that the best evidence of which the case in its nature is susceptible must be produced. When it appears that "better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated." "Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is, in general, admitted." 1 Greenl. Ev., §§ 82, 84. The application of these elementary principles is decisive of this branch of the case. The appellants never offered to introduce the written rules and customs of Green Horn gulch, or show that they had been lost or destroyed, and the evidence that was excluded could not be substituted to prove the existence of the mining claim described as claim numbered two in this gulch. The written rules and customs were the best evidence in this case.

The court ruled properly that no evidence of the possession of the property by the appellants, or declarations of the respondent regarding the same, could be admitted until the identity of the mineral ground had been established by the highest testimony. The deed does not contain a de-

scription which can aid the jury in ascertaining the boundaries of the claim, and was incompetent.

The appellants contend that the judgment roll in *Rankin* v. *Campbell et al.* is conclusive of some of the issues in this action, and that the respondent is estopped from denying that the appellants are the owners of the property. It is maintained that the judgment entered in favor of Campbell *et al.*, in that cause, was made in the case which was tried upon its merits, between the same parties, and in which the same subject-mater was litigated as that under consideration. If this proposition is correct, that judgment would be a complete bar to another suit between the same parties or their privies for the same cause. "When a fact has once been put in issue and determined by a final judgment in the course of a judicial proceeding, such judgment is conclusive evidence of the existence of the fact in all controversies between the same parties in which it is material." *Stockwell* v. *Silloway*, 113 Mass. 385, and cases there cited; *Bigelow* v. *Winsor*, 1 Gray, 301; *Foote* v. *Gibbs*, id. 412; *Jones* v. *Petaluma*, 36 Cal. 230; *Boggs* v. *Clark*, 37 id. 236; *Tracy* v. *Merrill*, 103 Mass. 282, and cases there cited.

It appears from the pleadings, in *Rankin* v. *Campbell et al.*, that Rankin was required to establish by the testimony that he was the owner of a certain mining claim in Confederate gulch, or entitled to its possession; that the defendants wrongfully entered thereon and took and withheld its possession from him. The prayer of the complaint is for the possession of the property, $250 as damages and a temporary and perpetual injunction. There are other allegations in the complaint respecting the insolvency of Campbell *et al.* which might be material if the court was asked to grant equitable relief. The defendants pray to be dismissed without day and for their costs, and no valid judgment could be rendered that they were entitled to the mining ground described in the pleadings. If Rankin failed to prove some of the material allegations referred to, Campbell *et al.* might obtain a judgment without offering any evidence. Rankin

might have the right of property and the defendants might have the right of possession. If the jury based the verdict upon the failure of the plaintiff to show that Campbell *et al.* withheld the possession of the premises from him, it cannot be contended that the question of ownership was decided. *Arnold* v. *Arnold*, 17 Pick. 4.

Does the judgment entered in *Rankin* v. *Campbell et al.* constitute an estoppel in this action? We think that the law determining this question has been announced in the following cases. In *Richardson* v. *Boston*, 19 How. 263, Mr. Justice GRIER says: "The plea of general issue, in actions of trespass or case, does not necessarily put the title in issue; and, although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in an another action for a different trespass." In *Burlen* v. *Shannon*, 99 Mass. 202, Mr. Justice FOSTER examines the authorities and says: "The ground taken by the defendant is, that a general verdict and judgment are conclusive in favor of the prevailing party as to all issues actually involved in the trial, upon which any evidence was offered and which were submitted to the jury, although it may not appear that they were the very points on which the decision turned, and it may be doubtful in favor of which party any one of them was found, or even whether as to all of them the jury came to any conclusion. Such, however, is not in our opinion the true doctrine of the law. A verdict and judgment are conclusive by way of estoppel only as to those facts which are necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered." The argument of the appellants is the same as that submitted by the defendant in *Burlen* v. *Shannon*, *supra*, and refuted by the court. In *Lea* v. *Lea*, 99 Mass. 496, the court says that "there are no means of determining upon which of the three consistent grounds of defense the verdict was rendered; and therefore it cannot be conclusive upon either." Bigelow on Estoppel (2d ed.), 82, 88, and cases there cited; *Packet Co.* v.

Sickles, 5 Wall. 580; *Leonard* v. *Whitney*, 109 Mass. 268. We are unable to decide on which of the questions of fact submitted to the jury, in the case of *Rankin* v. *Campbell et al.*, the verdict was based, and we do not think the judgment is conclusive upon any of them. The ownership and right of possession of the property in controversy are not necessarily involved in the determination of the action by the jury. The judgment roll was not competent testimony in this case. The suit of *Campbell et al.* v. *Ford et al.* was the effect of the judgment in the other action, in which the temporary injunction was dissolved, and its judgment roll could not affect the issues which were tried in this cause.

Judgment affirmed.